



**6560-50-P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR PART 52**

**[EPA-R02-OAR-2016-0316; FRL-9947-77-Region 2]**

**Finding of Failure to Submit a State Implementation Plan; New Jersey; Interstate Transport Requirements for 2008 8-hour National Ambient Air Quality Standards for Ozone**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is taking final action finding that New Jersey has failed to submit an infrastructure State Implementation Plan (SIP) revision to satisfy certain interstate transport requirements of the Clean Air Act (CAA) with respect to the 2008 8-hour ozone national ambient air quality standard (NAAQS). Specifically, these requirements pertain to the obligation to prohibit emissions which significantly contribute to nonattainment, or interfere with maintenance, of the 2008 8-hour ozone NAAQS in other states. This finding of failure to submit establishes a 2-year deadline for the EPA to promulgate a Federal Implementation Plan (FIP) to address the interstate transport SIP requirements pertaining to the state's significant contribution to nonattainment and interference with maintenance of the 2008 ozone NAAQS in other states unless, prior to the EPA promulgating a FIP, the state submits, and the EPA approves, a SIP that meets these requirements.

**DATES:** This rule is effective on **[Insert date 30 days from date of publication in the *Federal Register*].**

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA-R02-OAR-2016-0316. All documents in the docket are listed on the [www.regulations.gov](http://www.regulations.gov) web site.

**FOR FURTHER INFORMATION CONTACT:** Kenneth Fradkin, Environmental Protection Agency, 290 Broadway, 25<sup>th</sup> Floor, New York, NY 10007-1866, (212) 637-3702, or by email at [Fradkin.Kenneth@epa.gov](mailto:Fradkin.Kenneth@epa.gov).

**SUPPLEMENTARY INFORMATION:**

Section 553 of the Administrative Procedures Act, 5 United States Code (U.S.C.) 553(b)(3)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. The EPA has determined that there is good cause for making this rule final without prior proposal and opportunity for comment because no significant EPA judgment is involved in making a finding of failure to submit SIPs, or elements of SIPs, required by the CAA, where states have made no submittals, or incomplete submittals, to meet the requirement by the statutory date. Thus, notice and public procedure are unnecessary. The EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(3)(B).

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## **I. Background**

Section 110(a) of the CAA imposes an obligation upon states to submit SIPs that provide for the implementation, maintenance and enforcement of a new or revised NAAQS within 3 years following the promulgation of that NAAQS. Section 110(a)(2) lists specific requirements that states must meet in these SIP submissions, as applicable. The EPA refers to this type of SIP submission as the “infrastructure” SIP because the SIP ensures that states can implement, maintain and enforce the air standards. Within these requirements, section 110(a)(2)(D)(i) contains requirements to address interstate transport of NAAQS pollutants. A SIP revision submitted for this sub-section is referred to as an “interstate transport SIP.” In turn, section 110(a)(2)(D)(i)(I) requires that such a plan contain adequate provisions to prohibit emissions from the state that will contribute significantly to nonattainment of the NAAQS in any other state (“prong 1”) or interfere with maintenance of the NAAQS in any other state (“prong 2”). Interstate transport prongs 1 and 2, also called the “good neighbor” provisions, are the requirements relevant to this findings notice.

Pursuant to CAA section 110(k)(1)(B), the EPA must determine no later than 6 months after the date by which a state is required to submit a SIP whether a state has made a submission that meets the minimum completeness criteria established in CAA section 110(k)(1)(A). The EPA refers to the determination that a state has not submitted a SIP submission that meets the minimum completeness criteria as a “finding of failure to submit.” If the EPA finds a state has failed to submit a SIP to meet

its statutory obligation to address 110(a)(2)(D)(i)(I), pursuant to section 110(c)(1) the EPA has not only the authority, but the obligation, to promulgate a FIP within 2 years to address the CAA requirement. This finding therefore starts a 2-year clock for promulgation by the EPA of a FIP, in accordance with CAA section 110(c)(1), unless prior to such promulgation the state submits, and the EPA approves, a submittal from the state to meet the requirements of CAA section 110(a)(2)(D)(i)(I). The EPA notes this action does not start a mandatory sanctions clock pursuant to CAA section 179 because this finding of failure to submit does not pertain to a part D plan for nonattainment areas required under CAA section 110(a)(2)(I) or a SIP call pursuant to CAA section 110(k)(5).

On March 12, 2008, the EPA strengthened the NAAQS for ozone. The EPA revised the 8-hour primary ozone standard from 0.08 parts per millions (ppm) to 0.075 ppm. The EPA also revised the secondary 8-hour standard to the level of 0.075 ppm making it identical to the revised primary standard. Infrastructure SIPs addressing the revised standard, including the interstate transport requirements, were due March 12, 2011.

On October 17, 2014, New Jersey submitted a multi-pollutant infrastructure SIP revision for 2008 Ozone, 2010 Sulfur Dioxide, 2010 Nitrogen Dioxide, 2008 Lead, 2011 Carbon Monoxide, and the 2012 PM<sub>2.5</sub> (Fine Particles) NAAQS. New Jersey addressed the “good neighbor” provision for the 2008 Ozone NAAQS in their submission.

On July 13, 2015, the EPA published a rule<sup>1</sup> finding that 24 states failed to submit complete SIPs that addressed the "good neighbor" provision for the 2008 Ozone NAAQS. See 80 FR 39961, (July 13, 2015). The finding action triggered a 2-year clock for the EPA to issue FIPs to address the “good

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<sup>1</sup> 80 FR 39961 (July 13, 2015) (effective August 12, 2015).

neighbor” requirements for those states by August 12, 2017. Prior to issuance of the finding action, New Jersey made a submission addressing the "good neighbor" provision for the 2008 Ozone NAAQS on October 17, 2014; therefore, the state was not included in the EPA’s July 2015 finding notice. Following New Jersey's submittal of their infrastructure SIP and the EPA’s July 2015 finding notice, the EPA proposed a rule on November 16, 2015<sup>2</sup> to address the “good neighbor” requirements for the 2008 Ozone NAAQS. The rule proposed to promulgate FIPs in 23 eastern states, including New Jersey, to reduce interstate ozone transport as to the 2008 ozone NAAQS. The EPA proposed to issue final FIPs only for those states that either failed to submit a SIP or for which the EPA disapproved a state’s SIP addressing the “good neighbor” provision by the date the rule was finalized. The EPA expects to finalize the rule and respective FIPs, as applicable, later this year.

In a letter to the EPA dated March 30, 2016, New Jersey withdrew from EPA’s consideration the “good neighbor” portion of its multi-pollutant infrastructure SIP as it relates to the 2008 ozone NAAQS. New Jersey stated that it was withdrawing that portion of its submission “in order not to delay the EPA's ability to implement the FIP on those upwind states that are significantly contributing to ozone levels in New Jersey and the other states within [New Jersey’s] shared ozone nonattainment area.” New Jersey stated that its decision to withdraw was based on a desire that EPA would “fully implement the FIP” proposed in 2016, and that it “reserve[d] the right to resubmit” the language of its original submission. The full letter can be found in the docket for this rulemaking<sup>3</sup>.

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<sup>2</sup> See "Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS; Proposed Rules," 80 FR 75706 (December 3, 2015).

<sup>3</sup> Letter from Bob Martin, Commissioner, New Jersey Department of Environmental Protection to Judith Enck, Regional Administrator, U.S. EPA Region II, March 30, 2016.

On the basis of New Jersey's March 30, 2016 withdrawal letter, New Jersey does not have a complete pending submittal addressing the "good neighbor" provision for the 2008 ozone NAAQS. The EPA is therefore making a finding that New Jersey has failed to submit a SIP revision to address the requirements of CAA sections 110(a)(2)(D)(i)(I) as to the 2008 ozone NAAQS.

## **II. Final Action**

This action reflects the EPA's determination with respect to the requirements of CAA section 110(a)(2)(D)(i)(I) for the 2008 8-hour ozone NAAQS for New Jersey, as discussed in section I of this findings notice. The EPA is making a finding of failure to submit for New Jersey for the interstate transport requirements of CAA section 110(a)(2)(D)(i)(I) for the 2008 8-hour ozone NAAQS. This finding starts a 2-year clock for promulgation by the EPA of a FIP after the effective date of this final rule, in accordance with section 110(c)(1), unless prior to such promulgation that New Jersey submits, and the EPA approves, a submittal that meets the requirements of CAA section 110(a)(2)(D)(i)(I) as to the 2008 ozone NAAQS. This finding of failure to submit does not impose sanctions, and does not set deadlines for imposing sanctions as described in section 179, because it does not pertain to the elements of a CAA title I, part D plan for nonattainment areas as required under section 110(a)(2)(I), and because this action is not a SIP call pursuant to section 110(k)(5).

## **III. Statutory and Executive Order Reviews**

*A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

*B. Paperwork Reduction Act*

This action does not impose an information collection burden under the Paperwork Reduction Act. This final rule does not establish any new information collection requirement apart from that already required by law.

*C. Regulatory Flexibility Act (RFA)*

This action is not subject to the RFA. The RFA applies only to rules subject to notice and comment rulemaking requirements under the Administrative Procedure Act (APA), 5 U.S.C. 553, or any other statute. This rule is not subject to notice and comment requirements because the agency has invoked the APA “good cause” exemption under 5 U.S.C. 553(b).

*D. Unfunded Mandates Reform Act of 1995 (UMRA)*

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action implements mandates specifically and explicitly set forth in the CAA under section 110(a) without the exercise of any policy discretion by the EPA.

*E. Executive Order 13132: Federalism*

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

*F. Executive Order 13175: Consultation and Coordination with Indian Tribal*

### *Governments*

This action does not have tribal implications as specified in Executive Order 13175. This rule responds to the requirement in the CAA for states to submit SIPs under section 110(a) to address CAA section 110(a)(2)(D)(i)(I) for the 2008 ozone NAAQS. No tribe is subject to the requirement to submit an implementation plan under section 110(a) within 3 years of promulgation of a new or revised NAAQS. Thus, Executive Order 13175 does not apply to this action.

### *G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks*

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

### *H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use*

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

### *I. National Technology Transfer and Advancement Act*

This rulemaking does not involve technical standards.

### *J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*

The EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority,



low-income or indigenous populations because it does not affect the level of protection provided to human health or the environment.

This notice is making a procedural finding that New Jersey has failed to submit a SIP to address CAA section 110(a)(2)(D)(i)(I) for the 2008 ozone NAAQS. The EPA did not conduct an environmental analysis for this rule because this rule would not directly affect the air emissions of particular sources. Because this rule will not directly affect the air emissions of particular sources, it does not affect the level of protection provided to human health or the environment. Therefore, this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations.

#### *K. Congressional Review Act (CRA)*

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. The CRA allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and comment rulemaking procedures are impracticable, unnecessary or contrary to the public interest (5 U.S.C. 808(2)). The EPA has made a good cause finding for this rule as discussed in the Supplementary Information section of this final rule, including the basis for that finding.

#### *L. Judicial Review*

Under Section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [insert date 60 days from the date of publication of this document in the Federal Register].

Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

#### **List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, and Reporting and recordkeeping requirements.

AUTHORITY: 42 U.S.C. 7401 et seq.

Dated: June 2, 2016.

Judith A. Enck,  
Regional Administrator,  
Region 2.

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